No. 3751

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,

Appellant,

vs.

YOUNG YEN and YOUNG SOON,

Appellees.

APPELLANT'S BRIEF

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STATEMENT OF FACTS.

Young Yen and Young Soon, the appellees herein, arrived at the Port of San Francisco from China on the S. S. "Nile" February 21, 1921, and thereupon made application to enter the United States as citizens thereof, claiming to be the foreign-born sons of Young Fai, whose status as a citizen of the United States is conceded.

After a hearing before a Board of Special Inquiry, their applications for admission were denied,

and, upon appeal, from said denial to the Secretary of Labor, the decision of the Board was affirmed and the appeal denied.

Thereafter, to wit, May 10, 1921, a petition for writ of habeas corpus was filed in the District Court (T. R. 3), and order to show cause was issued (T. R. 8). A demurrer to said petition was filed June 18, 1921 (T. R. 9), and on June 27, 1921, an order overruling the demurrer and directing the writ to issue, returnable July 2, at 10 o'clock a. m., was made, given and entered (T. R. 11).

Thereafter, to wit, July 2, 1921, a return to the writ was filed (T. R. 13), and on the same date petitioner filed a traverse to said return (T. R. 18). And upon further hearing in the matter, the following order of discharge was made, given and entered:

> "In the Matter of YOUNG YEN and YOUNG SOON, on Habeas Corpus.
>
> ORDER OF DISCHARGE.
>
> "This matter having been regularly brought on for hearing upon the issues joined herein, and the same having been duly heard and submitted, and due consideration having been thereon had, it is by the Court now here ORDERED that the said named persons in whose behalf the writ of habeas corpus was sued out are illegally restrained of their liberty, as alleged in the petition herein, and that they be and they are hereby discharged from the

custody from which they have been produced, and that they go hence without day.

"Entered this 2d day of July, 1921.

"(Seal) WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk."

It is from the above Order of Discharge that this appeal is taken.

ASSIGNMENT OF ERRORS.

Thirteen errors are set forth in the Assignment of Errors filed on behalf of appellant on which this appeal is based. The argument will, however, be confined to the following five points:

First: (XIII) That the Court erred in holding that the hearing or hearings accorded the said Young Yen and Young Soon by the immigration officials was or were unfair.

Second: (XII) That the Court erred in holding that there was an abuse of discretion on the part of the Board of Special Inquiry and the Secretary of Labor in denying the said Young Yen and Young Soon the right to enter the United States.

Third: (VII) That the Court erred in determining as a question of fact that Young Yen and Young Soon were or was either of them sons of Young Fai as against the decision of the Board of Special Inquiry and the Secretary of Labor that

the said Young Yen and Young Soon were not nor was either of them sons of Young Fai.

Fourth: (X) That the Court erred in determining as a question of fact that said Young Yen and Young Soon were citizens of the United States as against the decision of the Board of Special Inquiry and the Secretary of Labor that the said Young Yen and Young Soon were not citizens of the United States.

Fifth: (II) That the Court erred in holding that it had jurisdiction to issue the writ of habeas corpus in the above-entitled cause as prayed for in the petition on behalf of said Young Yen and Young Soon for a writ of habeas corpus.

ARGUMENT.

FIRST POINT.

THAT THE COURT ERRED IN HOLDING THAT THE HEARING OR HEARINGS ACCORDED THE SAID YOUNG YEN AND YOUNG SOON BY THE IMMIGRATION OFFICIALS WAS OR WERE UNFAIR.

DOES AN INSPECTION OF THE RECORDS IN THESE CASES SHOW THAT THE PROCEEDINGS WERE MANIFESTLY UNFAIR?

It is shown by the immigration records on file as exhibits herein that the appellees Young Yen and Young Soon arrived at the Port of San Francisco, California, on the S. S. "Nile" February 21,

1921. (Ex. A, pp. 41, 42), and thereupon made applications to enter the United States as citizens thereof, and presented affidavits of their alleged father, Young Fai, attached to which were their photographs and that of the alleged father (Ex. A, pp. 2, 37). There was also filed the affidavit of the witness Fong Git (Ex. A, pp. 1, 36).

Thereafter, to wit, March 7, 1921, the testimony of the alleged father, Young Fai (Ex. A, p. 18), the witness Fong Gat (Ex. A, p. 14), the applicant Young Soon (Ex. A, p. 13), and the applicant Young Yen (Ex. A, p. 9), was taken in shorthand and transcribed in typewriting and made a part of the immigration record.

Thereafter, to wit, March 15, 1921, additional testimony of the alleged father, Young Fai, the applicant Young Soon No. 15-7, (Ex. A, p. 26) and the applicant Young Yen (Ex. A, p. 24) was taken before a Board of Special Inquiry, at which time the testimony theretofore taken and transcribed was introduced and considered by said Board and made a part of the Board's record (Ex. A, p. 22).

Said Board, not being satisfied "that the relationship claimed has been satisfactorily established", voted that action be deferred and ten days be allowed for the production of additional evidence (Ex. A, p. 22.)

Thereafter, to wit, March 16, 1921, the attorney of record was notified in writing of the Board's action

and allowed ten days for the submission of further evidence (Ex. A, p. 27).

Thereafter, to wit, March 17, 1921, the attorney of record advised the Commissioner of Immigration in writing that he had no additional evidence to submit, and requested "that final action be taken at once." (Ex. A, p. 28).

Thereafter, to wit, March 24, 1921, the Board of Special Inquiry voted that the applicants Young Yen and Young Soon be denied admission to the United States, and said applicants were so notified and advised of their right of appeal to the Secretary of Labor. (Ex. A, pp. 30-a, 30, 29.)

Thereafter, to wit, March 25, 1921, the attorney of record and the Consul General for China were notified in writing that the applications of the said Young Yen and Young Soon to land had been denied. (Ex. A, pp. 31, 32.)

Thereafter notice of appeal to the Secretary of Labor was filed with the Commissioner of Immigration, March 29, 1921 (Ex. A. p. 33), and on March 30, 1921, the attorney of record was given full opportunity to review the entire records in the cases, including exhibits, as appears from his receipt therefore. (Ex. A, p. 35.)

Thereafter, to wit, April 7, 1921, the entire record, including exhibits, was forwarded to the Secretary of Labor, Washington, D. C., on appeal (Ex. A, p. 43). On the appeal before the Secretary of

Labor, the applicants were represented by Messrs Ralston and Hott, attorneys at law, who filed a brief on their behalf (Ex. A, p. 46).

After a careful review of all the evidence, a summary of which is set forth in the record, the Secretary of Labor dismissed the appeal. (Ex. A, p. 48.)

We believe that an inspection of the immigration records in this case will show that the applicants were given full, fair and impartial hearings; that they were afforded an opportunity to present all available witnesses, and that all witnesses so presented were fully and fairly heard.

The petition herein does not show nor does an inspection of the immigration record disclose wherein petitioners were denied any substantial right to which they were entitled either under the laws or the rules and regulations in such cases made and provided. It is now well settled that in the absence of such a showing the petition should be denied.

Chin Yow v. *United States,* 208 U. S.

In this case the Court said:

> "If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no farther. These facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts open

> the merits of the case, whether those facts are proved or not. And by the way of caution, we may add, that jurisdiction would not be established simply by proving that the Commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contary or impeaching testimony was adduced."

And in the more recent decision of this Court in the case of *Jeung Bock Hon v. White,* 258 Fed. 23, the Court, speaking through His Honor Morrow, C. J., held as follows:

> "We cannot say that the proceedings were manifestly unfair or that the actions of the executive officers were such as to prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by the statute. In such cases, the order of the executive officers within the authority of the statute is final."

SECOND POINT.

THAT THE COURT ERRED IN HOLDING THAT THERE WAS AN ABUSE OF DISCRETION ON THE PART OF THE BOARD OF SPECIAL INQUIRY AND THE SECRETARY OF LABOR IN DENYING THE SAID YOUNG YEN AND YOUNG SOON THE RIGHT TO ENTER THE UNITED STATES.

DOES AN INSPECTION OF THE IMMIGRATION RECORDS HEREIN DISCLOSE A MANIFEST ABUSE OF DISCRETION?

The reasons assigned by the Secretary of Labor for dismissing the appeal are set forth in the memorandum approved by him on page 49 of Exhibit A and are summarized in the closing paragraph, as follows:

> "The 1897 testimony of the alleged father is not satisfactorily explained by anything appearing in this record, or in the records of prior proceedings. In view of this unfavorable prior testimony which is not overcome by the affirmative showing made in behalf of the present applicants, it is not believed that the right of the latter to enter the United States as persons exempt from the provisions of the Chinese Exclusion Laws has been satisfactorily established. It is accordingly recommended that the appeal be dismissed.
>
> Alfred Hampton,
> Assistant Commissioner General.
>
> So ordered:
>
> E. J. Henning,
> Assistant Secretary."

The immigration records in this case show that Young Fai, the alleged father of the applicants, returned from a visit to China on the S. S. "Doric" April 28, 1897, and was admitted as a citizen of the United States May 13, 1897, by the Collector of Customs (Ex. B, p. 16). His examination at that time was short and will be found on the reverse side of page 16 of Exhibit B. He testified in part as follows:

Q. When did you see your uncle last?

A. A little over a year ago. Yes, in China.

Q. How long did he stay there?

A. My uncle went home to China QS 18 YR (1892). *I am not married. I have no brothers or sisters.*

Corroboration of the fact that he was not married at that time is found in the affidavit of Young Dong, one of his witnesses, who testified "that in the year 1892 he (I) went to China on a business and pleasure trip and returned to the United States in 1895, and that while he (I) was in China he (I) lived in the same village with the said Young Fai, his father and mother, and *saw him frequently and talked and went around with them.* (Exhibit B p. 12.)

If Young Fai was married at that time (he now claiming to have been married in 1893), it seems remarkable that this witness did not mention having seen Young Fai's wife in China, as he claims to have been well acquainted with Young Fai, his father and mother, and to have seen them and to have gone around with them frequently. The fact that he does not mention Young Fai's wife raises a strong presumption that Young Fai was not married at that time, and this presumption has not been overcome by anything appearing in the records.

On March 17, 1909, Young Fai appeared as a witness for an alleged son Young Nin, at which

time he testified he was married KS 19-9-20, which according to American reckoning, would be October 29, 1893. (Ex. C, p. 8). In the present case he testified that he was married in KS 19-1-16, which would be March 4, 1893, according to American reckoning. (Ex. A, p. 18.)

We have, therefore, three different statements regarding his marriage.

First—his testimony of 1897 that *"I am not married."*

Second—his testimony of March 17, 1909, that he was married "KS 19-9-20 (October 29, 1893)."

Third—his testimony of March 7, 1921, that he was married "KS 19-1-16 (March 4, 1893)."

Although he claims on two occasions to have been married in 1893, he gives a different month and day each time, first October 29 and then March 4, a difference of nearly eight months, as the date on which his marriage took place.

The record clearly discloses substantial conflict in the testimony of Young Fai as to the fact of his marriage. His testimony that he was married in 1893, as testified to in the present cases and in 1909, is no stronger or more entitled to credence than his testimony in 1897 that he was not married.

No motive has been assigned why Young Fai should testify to other than the truth in 1897. It is easy, however, to find a motive for his claiming

in his later testimony that he was married, for on those occasions he was attempting to bring his alleged sons into the United States, and, in order to accomplish this result it became necessary that he claim a wife and family in China.

These discrepancies and contradictions are, in respect to facts of time, place and relationship concerning which the witness cannot be presumed to be mistaken, and which appear to have been deliberately, knowingly and falsely made with intent to deceive. No reasonable or satisfactory explanation has been offered, although ample oportunity was afforded each witness to make such explanation, as it appears from the record that each was asked at the close of his examination, "Have you any further statement to make?" to which each replied "No."

In such a case as this we believe that the rule "*falsus in uno, falsus in omnibus*" should be applied.

In the case of *The Santissima Trinidad and The St. Ander* (7 Wheat. 283; 5 L. ed. 454-468), the United States Supreme Court, speaking through His Honor, Justice Story, says:

> "It has been said that if witnesses concur in proof of a material fact, they ought to be believed in respect to that fact, whatever may be the other contradictions in their testimony. That position may be true under circumstances; but it is a doctrine which can be received only

under many qualifications, and with great caution. If the circumstances respecting which the testimony is discordant be immaterial, and of such a nature that mistakes may easily exist, and be accounted for in a manner consistent with the utmost good faith and probability, there is much reason for indulging the belief that the discrepancies arise from the infirmity of the human mind, rather than from deliberate error. But where the party speaks to a fact in respect to which he cannot be presumed liable to mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage, or living in a particular place, if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood; and courts of justice, under such circumstances, are bound, upon principles of law, and morality and justice, to apply, the maxim *'falsus in uno, falsus in omnibus.'* What ground of judicial belief can there be left, when the party has shown such gross insensibility to the difference between right and wrong, between truth and falsehood? The contradictions in the testimony of the witnesses of the libelants have been exposed at the bar with great force and accuracy; and they are so numerous that, in ordinary cases no court of justice could venture to rely on it without danger of being betrayed into the grossest errors.''

Citizenship is a priceless heritage which is not to be bestowed upon one seeking to enter the United States for the first time without some competent and convincing proof of that fact. Something more

than a mere declaration of citizenship should be required. Were the Board of Special Inquiry, and the Secretary of Labor compelled to accept such testimony as being satisfactory? Is the evidence so positive or clear as to carry conviction to an unprejudiced mind? Does it not bear the earmarks of suspicion as to its truth? These questions are best answered by the opinion of this Court in the case of *Lee Sing Far v. United States,* 94 Fed. 834, wherein the Court, speaking through His Honor Hawley, District Judge, pages 836 and 837, says:

> "The question which we are called upon to decide is not whether there was any evidence tending to establish the fact that appellant was born in the United States, but is whether the evidence is so clear and satisfactory upon that point as to authorize this court to say that the court erred in refusing her to land, and in entering judgment that she be remanded. From the testimony it appears that appellant is of Chinese parentage. She has been in China, with her mother, for 17 years. In such a case it cannot be said that any presumption arises that she was born in the United States. It, therefore, devolves upon her to prove to the satisfaction of the court that she was born in this country. It does not necessarily follow that, because four witnesses have testified positively that she was born in San Francisco, there being no witnes to the contrary, their statements upon this question must be accepted as true. If such a rule were adopted and followed, there would be no more Chinese remanded in such

cases. It is safe to say that the United States is powerless to make any proof in any case as to the place of birth of Chinese children. In the very nature of the case it would, as a general rule, be impossible to do so. The only protection to the government, in the enforcement of the exclusion act in this character of cases, lies in the cross-examination of each witness, on behalf of the petitioner, whereby the 'crucial test' of his credibility may be applied. It may or may not always be successful; but it has often been said to be one of the most efficacious tests which the law has devised for the discovery of truth.

"If, from the whole testimony, the court is not satisfied that the witnesses have told the truth, it has the right to exclude their testimony, and remand the petitioner, because the evidence offered is insufficient to convince the mind of the court that the petitioner is entitled to land in the United States."

In *Quock Ting v. U. S.*, 140 U. S. 417, 420; 11 Sup. Ct. 733, 851, the Court said:

"Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his ac-

count of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced."

Because of the character of the evidence and the contradictions and discrepancies therein, the Board of Special Inquiry and the Secretary of Labor were called upon to exercise a discretion in the determination of the matter before them. In the exercise of this discretion they could have decided either in favor of or against the applicants, and there being some evidence in support of that decision, their reasons for so doing would not be subject to judicial review by the Court.

Abuse Justifying Interference.

"The 'abuse of discretion,' to justify interference with the exercise of discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency. 29 Ind. A 395; 62 N.E. 107-111." 1 C. J., 372.

"The exercise of an honest judgment, however erroneous it may appear to be, is not an abuse of discretion. Abuse of discretion and especially gross and palpable abuse of discretion, which are terms ordinarily employed to justify an interference with the exercise of dis-

cretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency. 29 N. Y. 418, 431." 1 C. J., 372.

"Difference in judicial opinion is not synonymous with abuse of judicial discretion. 62 N. J. L. 380, 383." 1 C. J., 372.

This Court, speaking through His Honor, Morrow, C. J., in *White v. Gregory,* 213 Fed. 768, 770, says:

"In reaching this conclusion the officers gave the aliens the hearing provided by the statute. This is as far as the Court can go in examining such proceedings. It will not inquire into the sufficiency of probative facts, or consider the reasons for the conclusions reached by the officers."

In the recent case of *Jeung Bock Hong and Jeung Bock Ning v. White,* 258 Fed. 23, the Court, speaking through His Honor Morrow, C. J., said:

"The discrepancies in the testimony appear to be unimportant but if taking them altogether the executive officers of the Department found that the evidence in support of the petitioner's right to land and enter the United States was so impaired as to render it unsatisfactory, the Court is not authorized to reverse that conclusion."

"We cannot say that the proceedings were manifestly unfair or that the actions of the executive officers were such as to prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by

the statute. In such cases, the order of the executive officers within the authority of the statute is final."

THIRD POINT.

THAT THE COURT ERRED IN DETERMINING AS A QUESTION OF FACT THAT YOUNG YEN AND YOUNG SOON WERE OR WAS, EITHER OF THEM, SONS OF YOUNG FAI AS AGAINST THE DECISION OF THE BOARD OF SPECIAL INQUIRY AND THE SECRETARY OF LABOR THAT THE SAID YOUNG YEN AND YOUNG SOON WERE NOT NOR WAS EITHER OF THEM SONS OF YOUNG FAI.

FOURTH POINT.

THAT THE COURT ERRED IN DETERMINING AS A QUESTION OF FACT THAT SAID YOUNG YEN AND YOUNG SOON WERE CITIZENS OF THE UNITED STATES AS AGAINST THE DECISION OF THE BOARD OF SPECIAL INQUIRY AND THE SECRETARY OF LABOR THAT THE SAID YOUNG YEN AND YOUNG SOON WERE NOT CITIZENS OF THE UNITED STATES.

The General Appropriation Act of August 18, 1894 (28 Stat. L. 390), provides as follows:

> "In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter

made the decision of the appropriate immigration or custom officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Labor."

In the case of *Ekiu v. United States,* 142 U. S. 660, the Court says:

> " * * * in such a case, as in all others in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted."

In *United States v. Ju Toy,* 198 U. S. 253, the Court says:

> "It is established, as we have said, that the Act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed, as well when it is citizenship as when it is domicile and the belonging to the class excepted from the Exclusion Acts."

FIFTH POINT.

THAT THE COURT ERRED IN HOLDING THAT IT HAD JURISDICTION TO ISSUE THE WRIT OF HABEAS CORPUS IN THE ABOVE-ENTITLED CAUSE AS PRAYED FOR IN THE PETITION ON BEHALF OF SAID

YOUNG YEN AND YOUNG SOON FOR A WRIT OF HABEAS CORPUS.

It appears to us that the petition in this case fails to set forth facts sufficient to justify the issuance of the writ of habeas corpus. It is more in the nature of an appeal from the discretion of the Department to the discretion of the Court. In such a case the Supreme Court in the case of *Central Trust Company v. Central Trust Company,* 216 U. S. 251, 262; 54 L. ed. 469, 472, says:

> "The appeal made by the complainant to the Department was really nothing but an appeal to its discretion. Assuming that the Court in some cases has the power to, in effect, review the determination of the Department, we do not think this is an occasion for its exercise. The complainant is really appealing from the discretion of the Department to the discretion of the Court, and the complainant has no clear legal right to obtain the order sought."

In *Low Wah Suey v. Backus,* 225 U. S. 460 (56 L. ed. 1167), the Court, speaking through Mr. Justice Day, says:

> "A series of decisions in this Court has settled that such hearings before executive officers may be made conclusive when fairly conducted. *In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, IT MUST BE SHOWN THAT THE PROCEEDINGS WERE MANIFESTLY UNFAIR, THAT THE ACTION OF THE EXECUTIVE OFFICERS WAS SUCH AS*

TO PREVENT A FAIR INVESTIGATION, OR THAT THERE WAS A MANIFEST ABUSE OF THE DISCRETION COMMITTED TO THEM BY THE STATUTE." In other cases the order of the executive officers within the authority of the statute is final. U. S. v. Ju Toy, 198 U. S. 253, 49 L. ed. 1040, 225 Sup. Ct. Rep. 644; Chin Yow v. U. S., 208 U. S., 8 L. ed. 369, 28 Sup. Ct."

After a careful review of all the records in this case, we are firmly of the opinion that the petition should be denied. We do not believe that an inspection of the record will show that the hearings were manifestly unfair or that there was a manifest abuse of discretion on the part of the Secretary of Labor in dismissing the appeal in this case.

Respectfully submitted,

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